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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. ~~194.~~ ~~14~~ 8

THE LEHIGH ZINC AND IRON COMPANY, LIMITED,
PLAINTIFF IN ERROR,

vs.

CHARLES BAMFORD AND EDWIN BAMFORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 9, 1888.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Charles Bamford and Edwin Bamford, plaintiffs, and The Lehigh Zinc and Iron Company, Limited, defendant, a manifest error hath happened, to the great damage of the said The Lehigh Zinc and Iron Company, Limited, as is said and as appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Seal of U. S. Circuit Court, South. Dist. New York.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9th day of December, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed Dec. 9, 1887.
E. HENRY LACOMBE.

2 [Endorsed:] E. & A. A. 721. United States Supreme Court. The Lehigh Zinc and Iron Company, Limited, plaintiff in error, against Charles Bamford and Edwin Bamford, defendants in error. Writ of error. Alexander & Green, attorneys for plaintiff in error, 120 Broadway, New York city, N. Y. U. S. circuit court. Filed Oct. 3, 1888. John A. Shields, clerk.

Due service of within writ of error and receipt of a copy thereof is hereby admitted.
Dated New York, Dec. 12, 1887.

L. A. FULLER,
Att'y for C. & E. Bamford.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to fifty-five, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of The Lehigh Zinc and Iron Company, Limited, plaintiff in error, against Charles Bamford and Edwin Bamford, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this sixth day of October, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

3 Circuit Court of the United States for the Southern District of New York.

CHARLES BAMFORD & EDWIN BAMFORD, Pl'ffs,
vs.
THE LEHIGH ZINC & IRON COMPANY, LIMITED.

Timothy Griffith, clerk circuit court U. S., southern district of N. Y.:

You will please issue a summons to the defendant, The Lehigh Zinc & Iron Company, Limited, in the above-entitled action.

L. A. FULLER,
Attorney for Plaintiff-.

Office and post-office address, 261 Broadway, New York city.

(Endorsed:) Circuit court U. S., southern district of N. Y. Charles Bamford & *al. vs.* The Lehigh Zinc & Iron Co., Lim'd. Præcipe for summons. L. A. Fuller, attorney for plaintiffs. U. S. circuit court. Filed June 3, 1885. Timothy Griffith, clerk.

3½ United States Circuit Court for the Southern District of New York.

CHARLES BAMFORD & Another
against
THE LEHIGH ZINC & IRON COMPANY, LIMITED.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff-' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judg-

ment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of New [L. S.] York, this 3 day of June, in the year one thousand eight hundred and eighty-five.

TIMOTHY GRIFFITH, *Clerk.*

L. A. FULLER,
Plaintiff-' Attorney.

Office and post-office address, 261 Broadway, N. Y. city, New York.

3 [Endorsed:] United States circuit court, southern district of New York. Charles Bamford & another *vs.* The Lehigh Zinc and Iron Co., Limited. Summons. L. A. Fuller, plaintiff-' attorney. To the defendant within named: Take notice that upon default judgment will be taken for the sum of —— dollars, in money, with interest from the — day of ——, 18—, besides costs. —— ——, plaintiff-' attorney.

We hereby consent to the filing of foregoing copy summons in place of the original.

L. A. FULLER, *Pl'ffs' Att'y.*
ALEXANDER & GREEN,
Defendant's Att'y.

4 United States Circuit Court for the Southern District of New York.

CHARLES BAMFORD and EDWIN BAMFORD
against
THE LEHIGH ZINC AND IRON COMPANY (LIMITED).

Notice of Appearance.

SIR: Please to take notice that the defendant, The Lehigh Zinc and Iron Company (Limited), appears in this action, and that we are retained as attorneys for it herein and demand that a copy of the complaint and all papers in this action be served on us at our office, number 120 Broadway, New York city.

Dated N. Y., June 16th, 1885.

Yours, &c., ALEXANDER AND GREEN,
Attorneys for Def't.

Office and P. O. address, No. 120 Broadway, New York city.

To L. A. Fuller, Esq., plaintiffs' attorney, 261 Broadway.

5 (Endorsed:) U. S. circuit court, so. dist. of New York. Charles Bamford & Edwin Bamford against The Lehigh Zinc & Iron Company (Limited). Notice of appearance. Alexander & Green, attorneys for defendant, 120 Broadway, New York city. U. S. circuit court. Filed June 17th, 1885. Timothy Griffith, clerk.

6 United States Circuit Court for the Southern District of New York.

CHARLES BAMFORD & EDWIN BAMFORD, Pl'ffs,
vs.
THE LEHIGH ZINC & IRON COMPANY, LIMITED, Def'ts. } Complaint.

The plaintiffs, for their complaint, aver upon information and belief—

I. The plaintiffs are aliens, not citizens of the State of New York or of the United States, and are subjects of the Queen of Great Britain.

II. Defendants are a corporation created by and under the laws of the State of Pennsylvania.

III. On the second day of May, 1883, plaintiffs and defendants executed an instrument in writing, whereby plaintiffs granted to defendants the sole and exclusive right during the term of ten years after the execution of the same to enter upon a certain tract of land in the township of East Hemppeld, in the county of Lancaster, State of Pennsylvania, and to dig, mine, and carry away therefrom ores and minerals, and whereby defendants agreed to pay to plaintiffs a royalty upon said ores.

IV. Said instrument provided that in case the royalty due and payable to the plaintiffs according to the rates agreed upon
7 should in any year fall below the sum of $1,000, then the defendants should pay these plaintiffs such additional sum of money as should make the royalty for such year amount to the sum of $1,000, which should be held and taken to be royalty for that year.

V. Defendants, in May, 1883, entered upon said tract of land under the authority given in said instrument and dug and carried away ores, but in such quantity that at the rates provided for in the instrument the royalty for the year ending May 2nd, 1884, fell below $1,000, and the royalty for the year ending May 2nd, 1885, also fell below $1,000.

Whereby defendants became indebted to the plaintiffs and liable to pay to them as royalty the sum of $1,000 for *the* each of the years next ensuing the 2nd day of May, 1883, of which sum $59.49 has been paid and no more, leaving due and owing to plaintiffs the sum of $1,940.51 *dollars*, which, though requested, defendants refuse to pay, and for which sum of $1,940.51 *dollars* and interest from May 2nd, 1884, on $940.51 thereof and from May 2nd, 1885, on $1,000 thereof plaintiffs demand judgment with costs.

L. A. FULLER,
Pl'ffs' Att'y, 261 Broadway, N. Y. City.

CITY AND COUNTY OF NEW YORK, *ss:*

L. A. Fuller, being duly sworn, says: I am attorney for the pl'ffs herein. The foregoing complaint is true to my knowledge
8 except as to the matters therein stated to be alleged on information & belief, and as to those matters I believe it to be

true. The reason this verification is made by me is that the plaintiffs are absent from the State of New York. The sources of my information are the written lease and correspondence between the parties in my possession and statements made to me by Charles Bamford, one of the plaintiffs.

L. A. FULLER.

Sworn before me this 24 day of June, 1885.

BERNARD P. KERNAN,
Notary Public, N. Y. Co.

(Endorsed:) U. S. court. Charles Bamford *et al.* ag'st The Lehigh Zinc & Iron Company, Limited. Complaint. L. A. Fuller, 261 Broadway, New York. U. S. circuit court. Filed July 3, 1885. Timothy Griffith, clerk. Service admitted June 25, '85. Alexander & Green, def't- att'y-.

Circuit Court of the United States for the Southern District of New York.

CHARLES BAMFORD and EDWIN BAMFORD, Plaintiffs,
against
THE LEHIGH ZINC AND IRON COMPANY, LIMITED, Defendant.

First.

The above-named defendant, for answer to the complaint of the plaintiffs in this action, denies that it is a corporation created by or under the laws of the State of Pennsylvania, but alleges that it is a limited partnership created under the laws of the said State, as by reference to the act under which said partnership was created, ready to be produced upon the trial of this action, will fully and at large appear.

Defendant, further answering said complaint and referring to the alleged instrument in writing referred to in said complaint bearing date the second day of May, 1883, denies that said agreement was executed or delivered in any manner or under any consideration except as hereinafter specifically set forth, and it denies that under said agreement it became indebted to the plaintiff in the month of May, 1884, in the sum of nine hundred and forty $\frac{51}{100}$ dollars or in any other sum, or that it became indebted to the plaintiffs and liable to pay them as royalty under said agreement the sum of one
10 thousand dollars or any other sum for the year ending in May, 1885; and this defendant further denies that it is indebted to the plaintiffs under said agreement in any sum of money whatever.

Second.

And, for a second and further answer and defence to said action and by way of counter-claim herein, this defendant alleges that prior to the execution of said alleged agreement and in or about the month of April, 1883, the plaintiff Charles Bamford, claiming to represent himself and Edwin Bamford, also plaintiff in this action, in

order to induce this defendant to enter into said agreement, stated and represented that the mine referred to and mentioned in said agreement was a valuable ore-producing mine, and that the same by being properly worked would produce a large amount or ores and metals, consisting of zinc and other metals; that said mine had been previously worked and had produced large quantities of said metals and of the ores from which said metals could be extracted, and that it still continued to be and was a valuable mine for the purpose of extracting such ores and metals and would be a source of profitable investment to said defendant.

That at the time of said statements and representations said mine was flooded to the extent of nearly or quite one hundred feet, so that it was impossible for the defendant, through its officers, agents, and servants, to make actual inspection and examination of the said mine.

11 That, relying upon the statements and representations of said Bamford in that behalf, and believing the same to be true, this defendant, by its officers, made and entered into the contract referred to in the complaint; to the whole of which contract this defendant hereby refers as forming a part of its answer.

That immediately after the execution of said contract, in pursuance thereof, and in consequence of the representations and statements of said Bamford this defendant purchased from said Bamford a large quantity of tools, wagons, material, and personal property to be used by said defendant in the business of prosecuting the work of developing said mine, and paid therefor to said plaintiffs the sum of eight hundred and eighty-three $\frac{79}{100}$ dollars, which payment was made on the 25th day of May, 1883.

That said articles so purchased by this defendant from said plaintiffs were of no use or value to it except for the purpose for which they were purchased, to wit, to be engaged and used in the development of said mine.

That defendant further, after the execution of said contract, for the purpose of working said mine and making the same valuable, proceeded by the proper and necessary means to remove the water from said mine and to commence the business of taking out the alleged ores and the earth and rock in which said alleged ores were stated to be found.

That the expense of cleaning out said mine which was incurred and paid by said defendant was from twelve hundred to fifteen hundred dollars.

12 That this defendant employed a large number of men with teams, and also employed all necessary and proper means for the purpose of developing said mine, blasting, and taking out from said mine several hundred tons of material in which it was supposed said ores and metals would be found and sunk deep pits and put in several hundred feet of shafting and did everything that was possible to do for the purpose of developing said mine and obtaining the ores therefrom which the plaintiffs had represented could be obtained from it by proper means.

That in truth and in fact there were no ores in said mine of any

appreciable value whatever, and said mine had become thoroughly worked out and exhausted by said plaintiffs; that from the several hundred tons of material blasted out from said mine for the purpose of developing the same and obtaining the ores and metals this defendant was unable to obtain more than about forty tons of ore, which was almost valueless.

That this defendant thoroughly worked said mine and ascertained that there were no ores there of any value whatever.

That this defendant expended in the matter of developing said mine and in endeavoring to obtain the ores therefrom, in addition to the moneys paid for said materials and in addition to the moneys paid for cleaning out said mine, nearly or quite four thousand dollars, making a total expenditure in cash by this defendant in developing said mine of between five thousand five hundred and six thousand dollars.

13 That the officers of the defendant also devoted personal time and attention to the labor and work of developing the said mine, and that the value of the services of the said officers in so doing was at least the sum of two thousand five hundred dollars.

That all said expenditures were made in good faith under said contract and in reliance upon the statements and representations of said Charles Bamford in regard to the quality and character of said mine.

That said statements were untrue and said representations so made to induce this defendant to enter into said agreement were wholly and entirely false; and defendant alleges that by reason of the misrepresentations of said Charles Bamford, acting for said plaintiffs, it was induced to enter into said contract and to expend said moneys, and that it thereby became and has suffered loss and damage to the extent and amount of at least eight thousand dollars, which sum this defendant alleges is due and owing from said plaintiffs to it by reason of the matters in this answer alleged.

And defendant further alleges that under said contract plaintiffs did not convey to this defendant any valuable or other consideration therein, and that said contract was and is wholly and entirely void.

Wherefore defendant demands judgment against the plaintiffs for the sum of eight thousand dollars, besides the costs of this action.

ALEXANDER & GREEN,
Defendant's Attorneys, 120 *Broadway, N. Y.*

14 STATE OF NEW YORK, } ss.:
City and County of New York, }

August Heckscher, being duly sworn, says that he is the treasurer of the Lehigh Zinc and Iron Company, Limited, the defendant in the foregoing answer named, and he is also one of the partners composing said company, and that he is jointly interested with the other partners forming the said company as one of the partners therein.

That he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge except as to

the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

A. HECKSCHER.

Sworn to before me this 14 day of July, 1885.

WILLIAM J. CAMPBELL,
[SEAL.] *Notary Public* (9), *New York City and County.*

(Endorsed:) U. S. circuit court, southern district of New York. Charles Bamford and Edwin Bamford against the Lehigh Zinc and Iron Company, Limited. Answer. Alexander & Green, defendant's attorneys, office and P. O. address 120 Broadway, New York City, N. Y. U. S. circuit court. Filed July 15, 1885. Timothy Griffith, clerk.

15 U. S. Circuit Court, Southern District of N. Y.

CHARLES BAMFORD & ANO'R
vs.
THE LEHIGH ZINC & IRON COMPANY, LIMITED. } Reply.

The plaintiffs, by L. A. Fuller, their attorney, reply to the answer herein, and, upon information and belief, deny each and every allegation therein contained constituting or tending to constitute a counter-claim.

L. A. FULLER,
Pl'ffs' Att'y.

CITY AND COUNTY OF NEW YORK, *ss:*

Levi A. Fuller, being duly sworn, says: The foregoing reply is true to my knowledge except so far as it is alleged to be stated upon information and belief, and as to those matters I believes it to be true. This reply is verified by me and not by plaintiffs, for the reason that both plaintiffs are absent from the United States. I have no personal knowledge of the matters except such as is devised from perusal of documents and correspondence, and from these and the statements of witnesses my knowledge and belief are derived.

L. A. FULLER.

Sworn before me this 26th day of August, 1885.

BERNARD P. KERNAN,
Notary Public, N. Y. Co.

16 (Endorsed:) U. S. circuit. Charles Bamford & another, pl'ff-, ag'st The Lehigh Zinc & Iron Company, Limited, def't. Reply. L. A. Fuller, 261 Broadway, New York. U. S. circuit court. Filed Sep. 12, 1885. Timothy Griffith, clerk.

17 Circuit Court of the United States, Southern District of New York.

CHARLES BAMFORD and EDWIN BAMFORD, Plaintiffs,
against
THE LEHIGH ZINC AND IRON COMPANY, LIMITED, Defendant.

It is stipulated that plaintiffs have leave to amend their complaint by proper allegation, claiming judgment for the sum of one thousand dollars, with interest from May 1, 1886, in addition to the amount at present claimed in their complaint, being for an instalment under the lease referred to in this complaint, which plaintiffs claim became due on the first day of May, 1886;

The answer of the defendant to stand as an answer to the original complaint and to said amendment the same as though said answer had been served after such amendment to the complaint had been made.

Dated New York, October 12, 1886.

L. A. FULLER, *Pl'ffs' Att'y.*
ALEXANDER & GREEN,
Def't's Att'y.

Upon the foregoing consent, the plaintiffs' complaint is amended in accordance with the stipulation, the answer already served to stand as answer to the amended complaint.

N. SHIPMAN, *Judge.*

18 (Endorsed:) Circuit court of the United States, southern district of New York. Charles Bamford and Edwin Bamford, plaintiffs, against The Lehigh Zinc and Iron Company, defendant. Stipulation. U. S. circuit court. Filed Oct. 11, 1887. Timothy Griffith, clerk.

19 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the third day of November, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Nathaniel Shipman, judge.

CHARLES BAMFORD and EDWIN BAMFORD
vs.
THE LEHIGH ZINC AND IRON COMPANY (LIMITED).

Now come the plaintiffs, by L. A. Fuller, Esq., their attorney, and move the trial of this cause. Likewise comes the defendant, by Sidney Ward, Esq., its attorney. Thereupon a jury is empaneled and the cause proceeds to trial. After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, on Monday, Nov. 8, 1886, the jury retire, and on their return render a verdict whereby they find for the plaintiffs in the amount of three thousand two hundred and one dollars and fifty-eight cents ($3,201.58).

It is ordered that the defendant have a stay of all proceedings on said verdict for forty-five days from Nov. 8, 1886.

20 At a stated term of the circuit court of the United States for the southern district of New York held in the U. S. post-office building, in the city of New York, on the 30 day of September, 1887.

Present: Hon. Nathaniel Shipman, judge.

CHARLES BAMFORD & ANO., Plaintiffs,
vs.
THE LEHIGH ZINC & IRON COMPANY, L'D, Defendants.

A motion having been made herein upon the judge's minutes to set aside the verdict of the jury heretofore rendered in favor of plaintiff and for a new trial—

After hearing Mr. Sidney Ward for motion and Mr. L. A. Fuller opposed—

Ordered that said motion be, and hereby is, denied.

N. SHIPMAN, *Judge.*

(Endorsed:) U. S. circuit court. C. Bamford *et al.* ag'st The Lehigh Zinc & Iron Company, Limited. L. A. Fuller, pl'ff- att'y. Order denying motion for new trial. U. S. circuit court. Filed Oct. 11, 1887. Timothy Griffith, clerk.

21 United States Circuit Court, Southern District of New York.

CHARLES BAMFORD and EDWIN BAMFORD, Plaintiffs,
against
THE LEHIGH ZINC & IRON COMPANY, LIMITED. } Judgment.

OCT., 1887.

The complaint of the plaintiffs having, by consent of parties and the order of the court duly made thereupon, been so amended as to claim a recovery for one thousand dollars, with interest thereon from May 1st, 1886, in addition to the amount originally claimed, being for an instalment under the lease referred to in the complaint which plaintiffs claim to be due on the 1st day of May, 1886,

And the jury having passed upon the claims of the plaintiffs as against the defendants and of the defendants as against the plaintiffs, and the jury having rendered a verdict in favor of the said plaintiffs for three thousand two hundred and one dollars $\frac{58}{100}$ dollars:

Now, upon motion of L. A. Fuller, the plaintiffs' attorney, it is adjudged that Charles Bamford and Edwin Bamford, the plaintiffs, do recover judgment against the Lehigh Zinc and Iron Company, Limited, a joint-stock company, the said sum of three thousand two hundred and one $\frac{58}{100}$ dollars, together with costs, adjusted at three hundred and seventy-four $\frac{12}{100}$ dollars, making in all
22 the sum of three thousand five hundred and seventy-five $\frac{70}{100}$ dollars, for which the plaintiffs are entitled to judgment and

execution against the said defendants and also to judgment extinguishing the counter-claim set up in defendant's answer.

Judgment signed this eleventh day of October, A. D. 1887.

JOHN A. SHIELDS,
Deputy Clerk.

(Endorsed:) U. S. circuit court, south. dist. N. Y. Lehigh Zinc and Iron Company, The, Limited, ads. Charles Bamford and Edwin Bamford. Judgment. L. A. Fuller, 102 Broadway, New York. U. S. circuit court. Filed Oct. 11, 1887, 3 p. m. Timothy Griffith, clerk.

23 Circuit Court of the United States for the Southern District of New York, October Term, 1886.

CHARLES BAMFORD and EDWIN BAMFORD, Plaintiffs, *against* THE LEHIGH ZINC AND IRON COMPANY, LIMITED, Defendant. } Bill of Exceptions.

This cause came on to be tried at a regular term of this court held at the United States court-rooms, in the post-office building in the city of New York, on the third day of November, 1886.

Present: Honorable Nathaniel Shipman, district judge, presiding.

Mr. L. A. Fuller appeared as counsel for plaintiffs and Mr. Sidney Ward as counsel for defendant.

A jury having been duly empanelled and sworn, plaintiffs' counsel, to maintain his cause of action, offered in evidence the lease referred to in the complaint herein, dated the second day of May, 1883, of which the following is a copy:

This indenture, made this second day of May, A. D. one thousand eight hundred and eighty-three, by and between Charles and Edwin Bamford, of Cheshire, England, parties of the first part, and the Lehigh Zinc and Iron Company, Limited, of the State of Pennsylvania, party of the second part, witnesseth:

Whereas said parties of the first part are the owners in
24 fee simple title of all that certain tract or parcel of land situate in the township of East Hempfield, county of Lancaster, State of Pennsylvania, more fully described and bounded as set forth in a certain conveyance made on the thirty-first day of March, 1875, by John H. Swar and Elizabeth, his wife, unto the said Charles Bamford and Edwin Bamford, which conveyance was recorded in the office for recording deeds in and for the said county of Lancaster on the 31st day of March, 1875, in Book P Number Ten, page 454, &c., together with all the appurtenances thereunto belonging or in anywise appertaining, all buildings, improvements, works, pumps, hoisting and other machinery, implements and fixtures upon the premises, with the right to use the same, and also the sole and exclusive right and privilege of mining, digging, raising, crushing, concentrating, roasting, using, removing, selling, or disposing

of all metals or minerals found or to be found upon the said above-described premises; and

Whereas said party of the second part is desirous of obtaining from said parties of the first part the right to mine, dig, raise, crush, concentrate, roast, and use and remove, sell and dispose of all metals or minerals found or to be found upon the said above-described premises; and

Whereas said party of the second part is desirous also of using during the continuance of this indenture such of the buildings, improvements, works, pumps, hoisting and other machinery, implements and fixtures as are more particularly described and enumerated in "Inventory A," to be hereunto annexed, which is
25 hereby made a part of this indenture:

Now, in consideration of the sum of one dollar in hand, well and truly paid by said party of the second part to said parties of the first part, the receipt whereof is hereby acknowledged, and — considerations also of the stipulations and covenants hereinafter specified and set forth to be faithfully kept and performed, it is mutually understood and agreed as follows:

First. The said parties of the first part do hereby covenant and agree to grant and do hereby grant unto the party of the second part the sole and exclusive right and privilege, during the term *to* ten years from and after the execution of these presents, to enter upon the said premises or any part thereof and search for, dig, mine, and to carry away ores, minerals, or fossils; and the free and uninterrupted right of ingress, *a*gress, and regress for its agents, workmen, horse-, carts, &c., over and upon the said premises for mining purposes; also the right to build and construct roads or railroads on or across the said lands either for mining the said minerals, etc., or for their transportation; also the right during the said term of using all of the buildings, machinery, fixtures, etc., enumerated in Inventory "A," to be hereunto annexed, said parties of the first part agreeing not to sell, remove, use, or dispose of the same in any manner unless after agreement with the party of the second part; also the right to alter, improve, change, rebuild, renew, add to, and enlarge any portion of said buildings, machinery, and fixtures, it being the intention of the parties hereto that said party of the
26 second part shall not be hindered, delayed, embarrassed, or prevented from carrying on its operations of digging, searching, mining, pumping, hoisting, hauling, crushing, raising, concentrating, washing, using and discharging water and refuse, dumping, piling, or storing, weighing, wasting and removing, selling and shipping, or using ores and minerals or metals from or on the premises, whether the same be obtained from the estate above described or from lands or mines not herein described:

Provided always that no wanton or unnecessary injury shall be done at any time to the buildings, crops, or soil.

Second. That the party of the second part, for and in consideration of the rights and privileges thus granted, hereto covenant and agree to pay to the said parties of the first part the following rents, profits, and tonnage due, to wit: Upon all concentrated ores removed

from or used upon the premises, the same having been obtained by crushing, sizing, washing, jigging, or separating ores mined upon said premises, a royalty of one dollar and fifty cents per ton of two thousand pounds (2,000 lbs.); upon all concentrated ores which may be obtained by crushing, sizing, washin*h*, jigging, or separating ores or minerals hauled and brought to the said premises from other estates or mines, a royalty for the use of the soil buildings, machinery, and fixtures hereby leased shall be paid to the parties of the first part as follows, viz: During two days of each week a royalty of fifty cents per ton of two thousand pounds of such ore so concentrated when removed from or used upon the premises aforesaid, and during the remaining five days of each week a royalty of one dollar for each ton of two thousand pounds so
27 concentrated when removed from the premises.

Third. Upon all ores mined upon and removed from the premises other than those above mentioned a royalty of one dollar and fifty cents a ton shall be paid to the parties of the first part; and it is also covenanted and agreed that the said party of the second part shall put all the engines, boilers, and machinery which it shall use in good and substantial repair, and keep and leave them in the same good order, ordinary wear and tear excepted.

Fourth. That the party of the second part shall weigh the concentrated ores before using or removing the same on the scales on the premises hereby leased, and shall keep proper and accurate books of account of all such weights, which said books shall state separately the weight of concentrated ores obtained from mines on the premises and of concentrated ores obtained from mines on other properties, and that such books shall at all reasonable times be open to the inspection of the parties of the first part or their duly authorized agent or attorney.

Fifth. That the party of the second part shall pay or cause to be paid to the parties of the first part or their duly authorized agent or attorney at New York city on the twentieth day of January, April, July, and October of each year all sums of money found to be due by said party of the second part for ores removed during the three full cal*l*endar months next preceding, and shall accompany each remittance with a detailed statement of weights and amounts so accruing, specifying also whence such ores were originally obtained.

28 Sixth. In case the royalty due and payable to the parties of the first part according to the above rates shall in any year fall below the sum of one thousand dollars, then the party of the second part shall pay to the parties of the first part such additional sum of money as shall make the royalty for such year amount to the sum of one thousand dollars, which sum shall be held and taken to be the royalty of that year: Provided always that if sufficient ores cannot be found to yield said minimum payment, and said party of the second part shall in consequence thereof fail to pay said minimum sum of one thousand dollars yearly, then said party of the second part shall, if required by said parties of the first part, relin-

quish this lease and the privileges hereby granted, and the same shall cease thereupon.

Seventh. All the prospect openings which shall not result in finding ore shall be filled up by the party of the second part as soon as the work in such holes is discontinued and the ground restored to its original state as far as can be done.

Eight. That the party of the second part shall have the exclusive right and privilege at any time while this indenture shall remain in force of declaring to the parties of the first part in writing its intention to purchase the entire estate above described, together with all and singular the mining rights, ores, minerals, buildings, improvements of all and every kind whatsoever for the purchase price of one hundred and twenty-five thousand dollars; and thereupon the parties of the first part shall within three months of the date of such notice execute and deliver to the said party of the second part a satisfactory warranty deed conveying all of the property as above set forth free and clear from all debt or encumbrances, which, upon payment of such purchase price, shall become the sole and absolute property of the party of the second part, it being understood and agreed that the sum of forty thousand dollars shall be paid upon execution and delivery of said deed, and that the sum of eighty-five thousand dollars shall be payable, one-half in two years and one-half in three years from the date thereof, and be secured by bond and mortgage, with interest payable at the rate of five per cent. per annum.

Ninth. That this indenture shall terminate on the second day of May, A. D. one thousand eight hundred and ninety-three, unless by mutual agreement within six months of the expiration thereof it shall be continued for a further term then to be agreed upon.

Tenth. That the party of the second part shall have the right and privilege at any time to carry to or remove from the premises such personal property or fixtures as it shall deem best, it being understood, however, that no part or portion of the property now on the premises as per inventory "A" shall be carried away, and provided always that said party of the second part shall have the covenants of this indenture binding upon the said party.

Eleventh. That said party of the second part shall, within three months after the expiration of this indenture or the extension thereof, remove and carry away from the premises hereby leased all and every article of personal property or fixtures which it may have brought to and used on or in the same, save or except that any additional alteration in the machinery or in the calcimining or smelting furnaces as now erected shall not be removed, but shall be left on the premises: Provided always that it shall have complied with and kept all the covenants of this agreement by it to be kept and performed.

Twelfth. That the conditions, stipulations, obligations, restrictions, and regulations herein contained shall apply to and bind the associates, heirs, executors, administrators, successors, and assigns of the respective parties hereto.

In witness whereof the said Charles Bamford has signed and

sealed these presents on behalf of the party of the first part, to wit, himself and partner, Edwin Bamford, and the party of the second part has caused the same to be signed by its chairman and attested by its treasurer, with its seal duly attached.

CHARLES BAMFORD,
For Self & Partner, Edwin Bamford.
RICH'D HECKSCHER, *Chairman.*

Witnesses to all signatures:
LUCIEN T. TROUTMAN.
J. H. TROUTMAN.

Attest: A. HECKSCHER, *Treas'r.*

This lease was admitted in evidence. Plaintiffs' counsel also offered a computation of interest upon the principal sum claimed in the complaint, being $201.58, which, with the principal of $3,000 claimed by the complaint, make a total of plaintiffs' claim of $3,201.58.

The plaintiffs' counsel rested on the introduction of this evidence.

Defendant's counsel moved the court to dismiss the plaintiffs' complaint on the following grounds:

31 First. That under the lease nothing yet appears to be due. Under the fifth subdivision of this lease it is provided that the defendant shall render plaintiffs an account of ores mined and pay a royalty according to the amount mined. There is no allegation whatever of any indebtedness arising by reason of our working the mine for ores. There is no provision under the lease in which the defendant is required to pay a royalty annually, except in the case of its mining ores, to such an extent as to produce a royalty of at least one thousand dollars per year. No right of action accrues under this lease until the end of the term, unless the royalty equal one thousand dollars per year. See sixth clause of this lease.

Second. Under this lease the right of the plaintiff to cancel this lease if they are not paid one thousand dollars is an assertion of a right which they will claim under this lease, and they are bound by it. It is submitted that this lease is a totality, and that defendant cannot be subjected to a series of lawsuits year after year under it. Plaintiffs have a right to forfeit the lease if they choose; otherwise they should wait until the end of the term to recover the amount agreed to be paid.

The court denied defendant's motion to dismiss the complaint, holding that under the reading of the whole of the sixth paragraph a minimum payment of one thousand dollars was to be paid at the expiration of each year; to whic- ruling and decision of the court defendant s counsel duly excepted.

The counsel for defendant, to maintain the allegations in the answer and the counter-claim set up therein, called witnesses

32 who testified that the plaintiff Charles Bamford, before the lease was executed, represented to defendant's officers that the mine referred to in the lease was a valuable mine, capable of

producing large quantities of ores of zinc; that the mine was flooded at the time of the execution of the lease, so that it could not be examined; that the defendant expended large sums of money, aggregating over five thousand dollars, in cleaning out said mine and working the same, and thoroughly worked said mine to obtain ores, and tending to show that said mine was not a valuable mine, but had been worked out and could not be made to produce ore in paying quantities or in any but very small quantities.

Defendants, in the latter part of 1883, ceased work in the mine "for the winter," and have never resumed, subsequently claiming that it was valueless for producing ores.

The plaintiffs called witnesses, including the deposition of the plaintiff Charles Bamford, who testified that the statements alleged to be made by the plaintiff Charles Bamford to defendant's officers were in fact true, and that the mine properly worked would prove to be a valuable ore-producing mine.

The questions of fact raised upon the pleadings and testimony were submitted to the jury under the charge of the judge presiding.

Plaintiffs also introduced testimony tending to show that the plaintiffs made no statements about the mine, but defendants were acquainted with the character of the mine and relied upon their own knowledge and not upon any statements of the plaintiffs.

33 It also appeared in evidence that the defendants entered into possession and used for several months the mine, as well as the various buildings and the machinery and fixtures described in the schedule to the lease, which buildings and fixtures were of large value and cost upwards of sixty thousand dollars.

It did not appear that any complaint of misrepresentation or failure or mistake or disappointment was made till the answer was filed in this action about August, 1885.

Letters from defendant's president were read in evidence, extracts from which appear in the charge of the court, which is therefore printed at large.

SHIPMAN, *J.*:

GENTLEMEN OF THE JURY: This action is brought to recover the rent for three years, of a thousand dollars annually, which was reserved upon a written lease for ten years of a zinc mine and concentrating works in the State of Pennsylvania, the lease having been dated May 2, 1883, and executed by the respective parties to this suit.

The execution of the lease and the non-payment of the rent, with the exception of $59.49, are substantially admitted by the defendants. The sum due upon the lease is claimed by the plaintiffs to be $3,201.58.

The questions in the case arise upon the defense which is interposed by the defendants, which are that the plaintiffs, who were the owners of the mine and the lessors, in order to induce the defendants to enter into an agreement, made certain representations in regard

to the value of the mine and the existence of ore therein which
34 were material and were relied upon as true by the defendants;
that the mine proved of no value, and that therefore no rent is due.

In the language of a text writer on this subject, " It is a general rule of law that in order to obtain redress or relief from injurious consequences of deceit it is necessary for the complaining party to prove that his adversary has made a false representation of material facts with knowledge of its falsity; that the complaining party was ignorant of its falsity and believed it to be true; that it was made with the intent that it should be acted upon, and that it was acted upon by the complaining party to his damage." If the representations were made by a party who assumed or intended to convey the impression that he had actual knowledge of the truth while conscious that he had no such knowledge, that is equivalent to knowledge of the falsity of his representations.

Deceit also consists in the assertion of material untrue representations in regard to the utterer's own business or property, made for the purpose of being acted upon and in fact relied upon by the purchaser, the truth of which the owner was bound to know and is presumed to know.

Each part of this definition is important, and I shall therefore call your attention to the facts in the case with reference to the various requisites of deceit, for, in my opinion, the important part of this case is not that the defendants took a lease on an empty mine, but it is whether the plaintiffs were chargeable with what the law styles deceit in inducing the defendants to take the mine.
35 The representations of the plaintiffs which are proved were that the mine was valuable; was very valuable; that he knew it was not worked out; that there was a very large deposit of ore. Those are the three things or perhaps four things: That the mine was valuable; was very valuable; that he knew it was not worked out; that there was a very large deposit of ore. Those are the four things which have been testified to in regard to —.

General opinions or assertions of the value of property by a vendor or lessor that it is valuable or ver- valuable, although they turn out to be untrue, are not considered misrepresentations which amount to deceit. They are not in the nature of a statement of existing facts, but are rather the expression of opinions or beliefs, which, especially when the opinions or beliefs of others familiar with the property can be obtained, are not regarded as representations of facts, but as the favorable opinion of the owner, which, although incorrect, are not the subject for an action for deceit and cannot be relied upon as a defense in an action upon trial.

In my opinion the assertions of the lessor that the mine was valuable or a very valuable one, standing by themselves, are not to be regarded by you as of importance upon the question whether misrepresentations were made. There are two other statements which are said to have been uttered by the lessor: That he knew that the mine was not worked out, and that there was a very large deposit of ore.

36 The character of these representations is next to be considered. You will observe that it is not alleged or proved that the lessor knew that these representations were untrue. As a general rule, to establish fraud by means of representation of existing material facts they must be made for the purpose of influencing the purchaser or the lessee and must be known to be untrue by the person who uttered them; but when being material and being made for the purpose of being acted upon they are uttered by the owner of the property in regard to the particulars of his own property which he is endeavoring to sell, the truth of which he is bound to know and must be presumed to know, and those representations are untrue, his knowledge of the untruth is not essential.

There is another point in regard to misrepresentations. Representations of what will happen or what will hereafter be found to exist, as in regard to the future of an undeveloped mine or the existence of ore in undeveloped territory when the present indications are yet to be tested and their accuracy to be ascertained, are not representations of existing facts, but of opinions and beliefs which are not properly styled deceit, although they turn out to be untrue; so that if when the lessor said that there was a large deposit of ore in the mine he was speaking of what was to be developed, of the veins yet unworked, or of the pockets yet to be struck, then such representations, though untrue, are not misrepresentations.

If, on the other hand, what he said — that there was then in the mine as developed and existing in the open shafts and in the bottom, open to view when the water was drawn off, a large
37 deposit of ore, then, inasmuch as he was the owner and was to be presumed to know in regard to the existing facts about his own developed mine, such representations would come within the principle which I have heretofore stated; so that it is important to ascertain the precise accuracy of the alleged representations that there was a very large deposit of ore.

One of the defendants' witnesses, Mr. Wetherrill, says that Mr. Bamford said that there was a very large deposit of ore, and the defendants insist that this language was in reference to the existing state of the developed mine. On the other hand, the plaintiff says that this language neither bears nor was understood at the time to bear such construction.

The ore in zinc mines of the class of which this mine belongs is said to be nearly always found in pockets. There is not a continuous, strong vein, but there are traces of ore scattered in the ore-producing tract which lead to the pockets of deposit of ore; and so, after one pocket has been exhausted, if there are still indications of the existence of further ore, the effect is to find or strike the pocket in which it lies.

The plaintiffs say that Mr. Bamford was talking to gentlemen who were familiar with zinc mining and with the character of zinc mines and who knew the meaning of language as used with reference to such mines, and that — is unreasonable to suppose that they understood Mr. Bamford to be talking about deposits of ore which could be then found in the mine; and it is said that it is apparent

from the defendants' letters that they understood at the time that this was the character of the representations.

38 In the letter of April 19, 1883, which contained a proposition to Mr. Bamford and was written after the two had visited the mine together and the alleged representations were made, Mr. Heckscher says: "It will be premature to say how large a business we expect to do on your premises until, by exploration and at a considerable outlay, we shall have ascertained the reliability of ore supply and its extent." In the letter of Mr. Heckscher of May 9, 1883, he says: "Our territory is quite sufficiently large on your farm alone if only the ore deposit be continuous. If not, then of course we are all at sea."

The plaintiff says that these letters show that Mr. Heckscher, who acted in the defendants' behalf, understood the uncertainties which were incident to the continuous character of zinc deposits, and that he knew that explorations only could determine the reliability and extent of ore supply, and that therefore he understood Mr. Bamford to be giving only his opinion, which examination and outlay would verify or destroy. The next representation is that Mr. Bamford knew that the mine was not worked out. If this statement was, and it was understood by the defendants to be, a positive statement of the lessor's knowledge of the existing fact that the mine as then developed was not worked out, it was a material fact; and when the owner of the property which he is endeavoring to sell or lease for the purpose of the representations being acted upon tells the purchasing party that he knows a material fact in regard to the property to be true, when he does not know it to be true or false, and it is not true, such a representation is a misrepresentation.

39 But if the statement was, and was understood by the defendant to be, merely the strong assertion of the belief of Bamford of the future of the undeveloped mine, then it would be unjust for the trier to compel him to suffer for the assertion of such a belief when it was known to be simply a violent assertion of the confident expectation of the owner in the future success in the search for ore. Some of the suggestions which I have made in regard to the previous representations bear upon the construction which is proper to be given to these representations. I have thus far been speaking upon the assumption that the representations as stated by the defendant were actually made. In order for the defendants to establish their defense it is of course necessary for them to establish to your satisfaction that these representations were actually made. I desire to caution you to scrutinize the accuracy of testimony in regard to conversations. The memory of honest witnesses who desire to tell the truth is apt to be unreliable in regard to the accuracy of conversations which they think they remember. So much depends upon the arrangements of words, the manner in which the words are said; so much depends upon the exact phraseology which was used and which, in a lengthy conversation, fades and disappears from the memory, that courts rather want to instruct juries that the memory of conversations is not reliable and not to place too much stress upon detached sentences in a conversation which

must have been of length and in which other forgotten portions may materially have modified and shaded the meaning of the words which are thought to be remembered.

40 Upon this part of the case the defendants point to the fact that the statement of their witnesses in regard to the representations are uncontradicted, and that it was natural that the defendants should ask the plaintiff in regard to the character of the mine. It was full of water. It was a discredited mine in the neighborhood and defendants would actually want to know what the plaintiff knew and would naturally build upon that foundation.

The plaintiffs say, on the other hand, that the deposition of Bamford, who was the only party to the conversation, was taken before the testimony of the defendants' witnesses was given and before he knew upon what they were to rely, and that all he knew in regard to the allegations or misrepresentations were contained in the answer and were as follows: "That the mine referred to and mentioned in said agreement was a valuable ore-producing mine, and that it still continued to be and was a valuable mine for the purpose of extracting such ores and metals." I omit, gentlemen, the alleged representations which were in regard to what the mine would do in the future.

These are the allegations that are made of the representations which the defendants say referred to the existing facts, that the mine was a valuable ore-producing mine; that it still continued to be and was a valuable mine for the purpose of extracting such ores and metals; and the plaintiffs say that those allegations are not as strong as the representations which are testified to, and that probably Mr. Bamford would not naturally feel himself called upon to say anything in regard to them in his deposition.

41 The plaintiff also relies upon the alleged silence of the defendants in regard to any misrepresentations until the suit was brought, in June, 1885, and if that silence is true, gentlemen, I may remark to you that silence in regard to a fraud which is alleged to have been perpetrated upon a party is evidence that that fraud was not actually committed or that it was far less violent and important than it is represented to be when silence is broken. If you find that the representations were actually made, and under the instructions which I have given were representations of existing material facts, you will next come to the question whether they are relied upon by the defendants, because if they were not relied upon and were not helpful in inducing them into the contract there was no deceit.

Upon this point Mr. Heckscher says that he had doubts at first in regard to the reliability of the mine, but was overborne by the assurance of Mr. Bamford, and says in substance that Mr. Bamford insisted upon leasing both the mine and concentrating works together. In reply to this the plaintiffs claim that the defendants endeavored to obtain a lease only of the concentrating works, which was their main or principal object; that the first letter was one of inquiry whether the plaintiffs desired to lease the concentrating works; that in the letter of April 19th, the one conveying the propo-

sition, Mr. Heckscher says, "We propose to lease from you, if you will agree to our proposition, your concentrating plant and machines as now erected, not only with a view of concentrating and
42 fo-warding to our works at Bethlehem ores to be mined from your estate, but also with the intention of using said plant for the treatment of ores to be obtained from adjoining estates. We do not think that the undertaking can be made successful if based upon your estate alone;" and so the plaintiffs say that the plan of the defendants was to concentrate and fo-ward to their Bethlehem works the ores mined in this and other estates, and that they did not expect success if ores from other properties could not be obtained.

Next, the plaintiffs say that the statements of Mr. Bamford were not relied upon, because they were known to be expressions of opinion in regard to the reliability and extent of ore supplied, which could only be ascertained by exploration and expense. The letters which I have heretofore referred to contained the foundation of this claim. The plaintiffs also contend that the defendants knew the history of the mine and acted upon their own judgment.

If you find in favor of the defendants upon the various points which have been submitted to you, then you may come to the question of whether the representations were untrue. The defendants say they were untrue, because the mine as developed was worked out—that is, substantially. Some 500 tons of rock were in the walls near the surface of the ground, which produced some forty tons of ore, but that the profit was exhausted. And I do not understand that Mr. Spilsbury materially and substantially differs from this view. In his opinion there had been a pocket of ore, there was some still left in the bottom of the 65-foot level; but, as an expert,
43 his opinion was that the territory was zinc-producing, and that the duty and business of the owner was to search for new pockets, which were in the neighborhood and could be found. Mr. Urin's testimony is that there was ore there. How much he does not say. And there is also evidence that this was not an exhausted mine, because a zinc mine of this class upon zinc-producing territory is not exhausted while the probabilities of existing pockets in the neighborhood are so strong.

In my opinion the important points in the case are those which I have heretofore submitted to you, and if you find that Bamford stated that the mine as developed—this pocket—was not exhausted, then the remaining question whether it was exhausted will be easily answered. If you find for the defendants you will reduce the rent as contracted for to its actual value. If the property was of no value to the defendants, by reason of the condition of the mine, then your verdict will be for the defendants. If the property—that is, the concentrating works—was or could, by reasonable exertion, have been of some value to them on account of their occupancy of the works, then the rent should be reduced proportionately. In addition to this the defendants have a counter-claim for damages arising from the alleged misrepresentations. This claim is based upon the theory that in addition to the mine being of no value the defendants have

suffered pecuniary damages from their reliance upon the plaintiffs representations; and assuming that you have found all the questions heretofore submitted to you in favor of the defendants, and that they suffered pecuniary damages resulting from misrep-
44 resentations, the measure of damages is the direct and natural pecuniary loss to which they were subjected by reason of the misrepresentations, which was the expense upon the mine and the business of the mine and the amount expended upon the leased property, provided this amount was expended in consequence of the misrepresentations, less the value of the concentrated ore.

Defendants' counsel excepts to that portion of the charge which implies perhaps that the mere failure of the defendants to allege a wrongful act of the plaintiff is evidence against them; in view of all the facts in the case, that his silence is to be construed in any way as evidence that those admissions had been made.

Defendants' counsel also excepts to the declination of the court to charge in accordance with his requests severally.

Defendants' Requests.

The defendants request the court to charge the jury as matter of law that—

First. That under the provisions of the lease in this action plaintiffs cannot recover unless it appears affirmatively that the ores mined on the property covered by such lease are sufficient under the royalty to be paid to amount to the sum of one thousand dollars per year.

The court refused to charge as thus requested; to which refusal counsel for defendant- thereupon duly excepted.

Second. That unless there was sufficient ore in the mine
45 to enable the defendant with proper care and attention and taking suitable means to develop said mine to mine zinc ore therein without loss the plaintiffs cannot recover, for the reason that the consideration upon which defendants' agreement was based has failed.

The court refused to charge as thus requested; to which refusal counsel for defendant- thereupon duly excepted.

Third. That if the jury find as a matter of fact there was no ore in said mine of sufficient amount to pay for mining the same, that the plaintiffs cannot recover and the verdict must be for defendants.

The court refused to charge as thus requested; to which refusal counsel for defendant- thereupon duly excepted.

Fourth. That if as an inducement to defendants to enter into the lease Charles Bamford represented the mine to be well supplied with ore, and defendant-, on faith of such representation, entered into said lease, and in fact there was not sufficient ore in said mine to be taken out in paying quantities, plaintiffs cannot recover, and defendants are entitled to recover its expenditures under said lease.

The court refused to charge as thus requested; to which refusal counsel for defendant- thereupon duly excepted.

Fifth. That if Charles Bamford represented said mine to be a val-

able mine, containing ore in paying quantity, and such was not the fact, whether he knew that the mine contained ore in paying quantity or not, the plaintiffs cannot recover, and that defendants are entitled to recover of plaintiffs their expenditures in cleaning out and working said mine and the incidental expenses
46 incurred by it under said lease.

The court refused to charge as thus requested; to which refusal counsel for defendant thereupon duly excepted.

The jury retired and returned to the court-room and rendered a verdict in favor of the plaintiffs in the sum of $3,201.58.

And because none of the said exceptions so offered and made to the rulings and opinions and decisions of the said presiding judge do appear upon the record of the said trial, and a case having been made by the defendant under leave to turn the same into a bill of exceptions, now, therefore, on the prayer of the said defendant, the said case is turned into the foregoing bill of exceptions, and the same are hereby stated, settled, and allowed as of the term when said cause was tried, to wit, the October term, A. D. 1886.

Witness my hand and seal this 11th day of October, A. D. 1887, the date when the judgment in said cause was entered, and by agreement of said parties this bill of exceptions is allowed as of the term when said cause was tried.

N. SHIPMAN, *Judge.* [L. S.]

It is hereby stipulated and agreed that the foregoing be taken and considered the bill of exceptions made by the Lehigh Zinc & Iron Company, Limited, and that the same be forthwith allowed, signed, and filed herein.

L. A. FULLER, *Pl'ffs' Att'y.*
ALEXANDER & GREEN,
Defendant's Attorneys.

47 [Endorsed:] U. S. circuit court, southern dist. of New York. Charles Bamford *et al. vs.* The Lehigh Zinc and Iron Co., Limited. Bill of exceptions. Filed this 4th day of Oct., 1888, *nunc pro tunc*, as of the 11th day of Oct., 1887, as per order of court.

48 Supreme Court of the United States.

THE LEHIGH ZINC AND IRON COMPANY, LIMITED, Plaintiff in Error, *against* CHARLES BAMFORD and EDWIN BAMFORD, Defendants in Error. } Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, comes the said plaintiff in error, by Alexander & Green, its attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendants in error against the said plaintiff in

error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff prays that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that it, the said plaintiff, may be restored to all things which it has lost by occasion of said judgment, &c.

The said plaintiff in error (the defendant in said action in said circuit court) also assigns its further causes of error in this behalf, to wit:

First. That on the trial of this action, at the close of the
49 plaintiffs' case, the court erred in refusing to grant the motion of the defendant to dismiss the plaintiffs' complaint.

Second. That the court erred in the ruling made in the charge to the jury, which was excepted to by the defendant at the close of said charge, as appears from the bill of exceptions herein.

Third. That the said court erred in refusing to charge the jury, as requested by defendant, as appears in the first request of the defendant to charge the jury contained in the bill of exceptions herein.

Fourth. That the said court erred in refusing to charge the jury, as requested by defendant, as appears in the second request of the defendant to charge the jury contained in the bill of exceptions herein.

Fifth. That the said court erred in refusing to charge the jury, as requested by defendant, as appears in the third request of the defendant to charge the jury contained in the bill of exceptions herein.

Sixth. That the said court erred in refusing to charge the jury, as requested by defendant, as appears in the fourth request of the defendant to charge the jury contained in the bill of exceptions herein.

Seventh. That the said court erred in refusing to charge the jury, as requested by defendant, as appears in the fifth request of the defendant to charge the jury contained in the bill of exceptions herein.

Dated Dec. 9, 1887.

ALEXANDER & GREEN,
Attorneys for Plaintiffs in Error,
120 *Broadway, New York City, N. Y.*

50 [Endorsed:] United States Supreme Court. The Lehigh Zinc & Iron Company, Limited, plaintiff in error, *vs.* Charles Bamford and Edwin Bamford, defendants in error. Assignment of error. Alexander & Green, attorneys for plaintiff in error, 120 Broadway, New York, N. Y. Due service of a copy of the within assignment of error as hereby admitted this 12th day of December, 1887. L.A. Fuller, att'y for defendant- in error. U. S. circuit court. Filed Oct. 4, 1888. John A. Shields, clerk.

51 Supreme Court of the United States.

THE LEHIGH ZINC AND IRON COMPANY, LIMITED, Plaintiff in Error,
vs.
CHARLES BAMFORD & EDWIN BAMFORD, Defendants in Error.
} Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendants in error, by L. A. Fuller, their attorney, come here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

L. A. FULLER,
Attorney for Defendant- in Error.
L. A. FULLER.

(Endorsed:) United States Supreme Court. The Lehigh Zinc and Iron Company, Limited, plaintiff in error, *vs.* Charles Bamford and Edwin Bamford, defendants in error. Joinder in error. L.
52 A. Fuller, attorney for defendant- in error. Due service of a copy of the within joinder in error is hereby admitted this 3d day of October, 1888. Alexander & Green, attorneys for plaintiff in error. U. S. circuit court. Filed Oct. 4, 1888. John A. Shields, clerk.

53 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

CHARLES BAMFORD and EDWIN BAMFORD
vs.
THE LEHIGH ZINC AND IRON COMPANY, LIMITED.
} Bond for Damages and Costs.

Know all men by these presents that we, The Lehigh Zinc and Iron Company, Limited; William Balbach, of 62 St. Mark's place, New York city, and Henry P. Johnson, of 219 West Fourth street, New York city, are held and firmly bound unto the above-named Charles Bamford and Edwin Bamford in the sum of eight thousand dollars, to be paid to the said Charles Bamford & Edwin Bamford; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the second day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas the above-named The Lehigh Zinc and Iron Company, Limited, has prosecuted its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-

entitled suit by the judge of the circuit court of the United States for the southern district of New York:

54 Now, therefore, the condition of this obligation is such that if the above-named The Lehigh Zinc & Iron Company, Limited, shall prosecute its writ of error to effect and answer all damages and costs if it shall fail to make its said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

LEHIGH ZINC & IRON CO., LIMITED,
By RICHARD HECKSCHER, *Chairman.* [L. S.]
ALBERT S. P. WETHERILL, *Sect.* [L. S.]
WM. BALBACH. [L. S.]
HENRY P. JOHNSON. [L. S.]

Sealed and delivered and taken and acknowledged this fifth day of December, 1887, before me as to Richard Heckscher, chairman of the Lehigh Zinc and Iron Company, Limited.

SAMUEL BELL,
[SEAL.] *Clerk U. S. Court, E. D. of Pa.*

Sealed and delivered and taken and acknowledged before me by William Balbach & Henry P. Johnson this 7 day of December, 1887.

ALLAN McCULLOH,
[L. S.] *Notary Public, N. Y. Co.*

55 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

William Balbach and Henry P. Johnson, the sureties in the within undertaking named, being duly sworn, each deposes and says that he is a householder and resident of the city of New York, and that he is worth the sum of sixteen thousand dollars over and above all his just debts and liabilities.

WM. BALBACH.
HENRY P. JOHNSON.

Sworn to this seventh day of December, A. D. 1887, before me—

ALLAN McCULLOH,
[L. S.] *Notary Public, New York County.*

Bond is satisfactory.

L. A. FULLER, *Pl'f-' Att'y.*

(Endorsed:) U. S. circuit court, southern district of New York. Charles Bamford & Edwin Bamford *vs.* The Lehigh Zinc and Iron Company, Limited. Bond for costs on writ of error. The within bond approved as to form and sufficiency of sureties Dec. 9, 1887. E. Henry Lacombe. U. S. circuit court. Filed Dec. 9, 1887. Timothy Griffith, clerk.

56 UNITED STATES OF AMERICA, ss:

To Charles Bamford and Edwin Bamford, Greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-eight, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Lehigh Zinc and Iron Company, Limited, — plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated December 9th, 1887.

E. HENRY LACOMBE.

57 [Endorsed:] E. & A. A. 721. U. S. Supreme Court. The Lehigh Zinc & Iron Company, Limited, plaintiff in error, against Charles Bamford & Edwin Bamford, defendants in error. Citation. Alexander & Green, att'ys for plaintiff in error, 120 Broadway, New York city, N. Y. U. S. circuit court. Filed Oct. 3, 1888. John A. Shields, clerk.

Due service of within citation and receipt of a copy thereof is hereby admitted.

New York, Dec. 12, 1887.

L. A. FULLER,
Att'y for C. & E. Bamford.

Endorsed on cover: S. New York. C. C. U. S. No. 194. The Lehigh Zinc and Iron Company, Limited, plaintiff in error, *vs.* Charles Bamford and Edwin Bamford. Filed October 9, 1888.

THE LEHIGH ZINC & IRON CO[illegible]

Plaintiff

against

CHARLES BAMFORD & EDWIN BA[illegible]

Defendants

BRIEF FOR PLAINTIFF IN [illegible]

SIDNEY WARD,

Attorney and of Counsel

for Plaintiff

Brandow Printing Co., Printers & Warren Street, N. Y.

Supreme Court of the United States.

THE LEHIGH ZINC & IRON COMPANY, LIMITED,
Plaintiff in Error,

against

CHARLES BAMFORD & EDWIN BAMFORD,
Defendants in Error.

Brief for Plaintiff in Error.

Statement of the Case.

This is a proceeding for writ of error to review a decision of the Circuit Court of the United States for the Southern District of New York.

The pleadings and evidence are set forth in the transcript of record filed October 9th, 1888. This action was brought by Charles Bamford and Edwin Bamford as plaintiffs in the Circuit Court of the United States for the Southern District of New York to recover an alleged claim for one thousand dollars for each year, under a certain indenture of lease, dated May 2d, 1883, between said Charles Bamford and Edwin Bamford, as lessors, and the Lehigh Zinc and Iron Company, Limited, lessee. This lease is set forth in full in the transcript of record from folios 23 to 31 inclusive, the claim of the plaintiffs in the

Court below being that they were entitled to recover one thousand dollars each year as an agreed sum to be paid for the lease, notwithstanding the ores mined, as set forth in the lease, should not produce a royalty of one thousand dollars per year. The defendant in the Court below (plaintiff in error here) denied any liability under the lease, alleging affirmatively that the mine leased to the plaintiff in error was utterly worthless and that the consideration for the execution of the lease, and its agreement therein to pay a royalty, had entirely failed (see last part of folio 13 of record). It also alleged affirmatively by way of counterclaim that the defendant immediately after the execution of the lease entered into possession of the mine and expended large sums of money in seeking to develop the same and that the amount so expended by them was between fifty-five hundred and six thousand dollars; that the officers of the defendant also devoted personal aid and attention to the labor and work of developing the mine and that the value of the said services was at least the sum of twenty-five hundred dollars, and demanded judgment against the plaintiffs in the Court below for $8,000, besides costs.

The complaint in this action is found at folios 6 to 9 of the record, and the answer of the defendant in the Court below from folios 9 to 14 inclusive. This cause was tried at a Circuit Court in the Southern District of New York. That trial resulted in a verdict in favor of the plaintiffs for three thousand two hundred one $\frac{58}{100}$ dollars. A motion to set aside the verdict in this case was heard before the Hon. Nathaniel Shipman, the Judge holding said Court, and that motion was denied and judgment upon the verdict was entered in favor of the plaintiff below for the amount of the verdict, with costs.

The plaintiff in error assigns as causes of error herein

1. That on the trial of this action at the close of the plaintiff's case, the Court erred in refusing to grant the motion of the defendant to dismiss the plaintiff's complaint. This motion appears on page 15 of the record at folio 31, defendant's motion being based upon the following grounds:

FIRST.—That under the lease nothing yet appears to be due. Under the fifth subdivision of this lease it is provided that the defendant shall render plaintiffs an account of ores mined and pay a royalty according to the amount mined. There is no allegation whatever of any indebtedness arising by reason of our working the mine ourselves. There is no provision under the lease in which the defendant is required to pay a royalty annually, except in the case of its mining ores, to such extent as to produce a royalty of, at least, one thousand dollars per year. No right of action accrues under this lease until the end of the term unless the royalty equals one thousand dollars per year. See sixth clause of this lease.

SECOND.—Under this lease the right of the plaintiff to cancel this lease, if they are not paid one thousand dollars, is an assertion of a right which they will claim under this lease and they are bound by it. It is submitted that this lease is a totality, and that defendant cannot be subjected to a series of law suits year after year under it. Plaintiffs have a right to forfeit the lease if they choose; otherwise they should wait until the end of the term to recover the amount agreed to be paid.

In support of this ground of error reference is specially made to subdivision 6 of the lease which appears at folio 28 of the transcript of the record.

SECOND ASSIGNMENT OF ERROR.

That the Court erred by the ruling made in the charge to the jury which was excepted to by the defendant at the close of said charge as appears by the bill of exception herein. This exception appears at folio 44, page 22 of the record. Defendant's counsel excepts to that portion of the charge which implies, perhaps, that the mere failure of the plaintiffs to allege a wrongful act of the defendant is evidence against them; in view of all the evidence in the case that his silence is to be construed in any way as evidence that those admissions had been made.

THIRD ASSIGNMENT OF ERROR.

That the Court erred in refusing to charge the jury, as requested by defendant, as appears in the first request of the defendant, to charge the jury contained in the bill of exceptions herein. This request is found on page 22 of the record, at the latter part of folio 44. That under the provisions of this lease in this action plaintiff cannot recover, unless it appears affirmatively that the ores mined on the property covered by such lease are sufficient under the royalty to be paid to amount to the sum of one thousand dollars per year.

FOURTH ASSIGNMENT OF ERROR.

That the Court erred in refusing to charge the jury, as requested by defendant, as appears in the second request of the defendant to charge the jury, contained in the bill of exceptions herein at folio 45.

SECOND.—That unless there was sufficient ore in the mine to enable the defendant, with proper care and attention and taking suitable means to develop said mine, to mine zinc ore therein without loss, the plaintiffs cannot recover

for the reason that the consideration upon which this agreement was based has failed.

FIFTH ASSIGNMENT OF ERROR.

That the Court erred in refusing to charge the jury, as requested by defendant, as appears in the third request of the defendant to charge the jury, contained in the bill of exceptions herein. See record, folio 45, third request.

That if the jury found as matter of fact that there was not ore in said mine of sufficient amount to pay for mining the same, that the plaintiffs cannot recover, and the verdict must be for defendants.

SIXTH ASSIGNMENT OF ERROR.

That the Court erred in refusing to charge the jury as requested by defendant, as appears in the fourth request of the defendant to charge the jury, contained in the bill of exceptions herein. This request and refusal appears in the latter part of folio 45, page 22, of the record.

That if, as an inducement to defendant to enter into this lease, Charles Bamford represented the mine to be well supplied with ore, and the defendant, on the faith of such representation, entered into said lease, and, in fact, there was not sufficient ore in said mine to be taken out in paying quantities, plaintiffs cannot recover, and defendant is entitled to recover its expenditures under said lease.

SEVENTH ASSIGNMENT OF ERROR.

That said Court erred in refusing to charge the jury as requested by defendant, as appears in the fifth request of the defendant to charge the jury, contained in the bill of exceptions herein. This request and refusal appear in Volume 45, on pages 22 and 23 of the record.

POINTS FOR PLAINTIFF IN ERROR.

Point First.

It was error in the Court to refuse defendant's motion (plaintiff in error here) to dismiss the complaint upon the close of the plaintiffs' case. The lease in question was a lease for ten years of a mine, situated at East Hempfield, in the County of Lancaster, in the State of Pennsylvania, under which the Lehigh Zinc and Iron Company, Limited, agreed to pay a royalty of $1.50 per ton (see folio 27 of record, page 13). At the close of the plaintiffs' case, in the Court below, the plaintiffs had failed to prove that any ore had been taken from the mine, with the exception of ores, the royalty on which amounted to $59.49, which fact appears from the allegation in the complaint, at the 7th folio of the case, where it appears that the defendant had paid to the plaintiffs the sum of $59.49 on account of royalties for ore taken out. The plaintiff had elected, in making the lease in question, to provide that if the royalty did not amount to $1,000 a year the plaintiff should have the right to determine the lease. Now, it is submitted that it is clear from this provision that the true intent of this contract was, that if the ores mined were sufficient to produce a royalty of one thousand dollars a year, the mine should be worked and carried on by the defendant; otherwise, that the plaintiffs might at their option rescind the lease and the same be determined. The sixth clause reads as follows: "In case the royalty due and payable to the parties of the first part, according to the above rates, shall in any year fall below the sum of one thousand dollars, then the party of the second part shall

pay to the parties of the first part such additional sum of money as shall make the royalty for such year amount to the sum of one thousand dollars, which sum shall be held and taken to be the royalty of that year; *Provided, always, that if sufficient ores cannot be found to yield said minimum payment, and said party of the second part shall in consequence thereof fail to pay said minimum sum of one thousand dollars yearly, then said party of the second part shall, if required by said parties of the first part, relinquish this lease and the privileges hereby granted, and the same shall cease thereupon.*"

This proviso, printed in italics, it is submitted, shows clearly what was the intention of both the parties to the contract, and that such intention was, that unless the ores which could be taken out should be of a sufficient amount to make a royalty of one thousand dollars, then the liability of the defendants under the same should cease. No other construction of this proviso will give it any force, for if it was not intended to have this construction, there would have been no occasion for its insertion at the end of the preceding sentence. That this was the actual intent of the party there is no question, and it is contended that this intention is fairly deducible from the fact of the insertion of this proviso at this point.

The position taken by defendant's counsel on the trial, that no action could be maintained by the plaintiffs in the Court below, for the one thousand dollars per year until the end of the term, is well taken, for the reason that, while it might not within one year have mined sufficient ore to produce a royalty of a thousand dollars, still the defendant was entitled, if the plaintiffs did not exercise their right to rescind the lease, to have the full term of ten years in which to mine the property and ascertain, if possible, whether the amount required to

produce the minimum of royalty might not be obtained. The plaintiffs could not recover on the entire contract, in any event, more than the difference between the whole amount of the royalties during the entire term, and the sum of $10,000, even if they could recover this sum by reason of the failure of defendants to work the mine. This action was prematurely brought.

Point Second.

The evidence in this case was conflicting as to the condition of the mine and for that reason the whole of the testimony has not been put into the transcript of the record, the testimony on the part of the plaintiff in error going to show that the mine was absolutely worthless and the testimony produced by the plaintiffs, the defendant in error here, was to the effect that the mine had some value; how great this value did not appear. At the close of the case and of the charge to the jury, the defendant requested the Court to charge the jury as follows (see folio 45 of record.):

1. That under the provisions of the lease in this action plaintiffs cannot recover unless it appears affirmatively that the ores mined on the property covered by such lease are sufficient under the royalty to be paid to amount to the sum of one thousand dollars per year. It is submitted that this is a proposition of law which is not to be controverted, for the reason that, under the contract and the full scope of it, it is apparent that the parties understood that if the mine would not produce ores sufficient, so that the royalty would equal one thousand dollars a year, that it would be substantially a non-paying mine, and for

those reasons it is submitted that the request to the Court to charge was well taken and that the refusal to so charge was error.

Point Third.

The second request of the defendant to the Court to charge (see folio 45 of record) is that, unless there was sufficient ore in the mine to enable defendant with proper care and attention and taking suitable means to develope said mine, to mine zinc ore therein without loss, the plaintiffs cannot recover, for the reason that the consideration upon which this agreement was based has failed. It is submitted that this proposition is entirely tenable and that the Court erred in refusing to charge as requested. It is evident that the defendant in hiring this mine did so for the purpose of mining the same for profit, and unless it could be maintained for profit there was no consideration to the defendant to enter into the lease, and the point taken in this request to charge is substantially this: that if the mine could not be worked so as to produce a profit, the plaintiffs' right to recover under it was gone.

Point Fourth.

It is submitted that the third request of the defendant to the Court to charge the jury was well taken and that the refusaltoso charge was error. This third request was that if the jury found, as matter of fact, that there was not ore in said mine of sufficient amount to pay for mining the same, that the plaintiffs cannot recover, and the verdict must be for defendants. The same suggestion

is made in regard to this alleged error as in regard to the previous one, to wit, that if the mine could not be worked so as to pay for the mining, there was no consideration to the defendant for entering into the contract.

Point Fifth.

The request of the defendant was that if as an inducement to defendant to enter into the lease Charles Bamford represented the mine to be well supplied with ore, and defendant on faith of such representation entered into said lease, and in fact there was not sufficient ore in said mine to be taken out in paying quantities, plaintiffs cannot recover and defendant is entitled to recover its expenditures under this lease. It is submitted that the refusal of the Court to charge as requested in this fourth request is error because the defendant, as has been suggested before, entered into this lease upon the statements and representations of Mr. Charles Bamford as to the condition of the mine. If, in point of fact, these statements were untrue, whether the statement was made wilfully or through ignorance, then the defendant, having gone on in reliance upon the statements of Charles Bamford, and having expended large sums of money and finding the mine to be worthless, was entitled to recover the expenditures which it had incurred in endeavoring to develop this mine.

Point Sixth.

The defendant, as appears from the record, folio 32, pages 15 and 16, had expended, in endeavoring to

develop this mine, large sums of money, aggregating over $5,000, in cleaning out said mine and working the same, and thoroughly worked said mine to obtain ores, intending to show that said mine was not a valuable mine, but had been worked out and could not be made to produce ore in paying quantities or in any but very small quantities.

Point Seventh.

The same point is raised by the fifth request to the Court to charge the jury shown at folio 45, pages 22 and 23, and the same suggestion is made in regard to this as is contained in the last preceding point.

It is submitted that the charge of the Court to the jury upon the several points raised here do not cover the requests or the defendant on the trial because it was the right of the defendant on the trial to have each of its requests, if they were sound propositions of law, submitted to the jury in substantially the form presented by its counsel. This was not done, and it does not appear but what, if these requests had been granted as prayed for on the trial, the jury, on consideration of the evidence, would have found one or more of these questions in favor of the defendant on the trial. In this connection, and which is submitted to be a controlling fact in this case, it appears from the testimony beyond dispute that, at the time of the execution of this lease, this mine was flooded and filled with water so that it could not be examined. That being the case, the defendant in entering into the lease was obliged to rely upon the statements of Mr. Charles Bamford as to the condition of the mine and as to its value for mining purposes. If the mine had not been flooded and could have been examined, the rule of *caveat emptor*, or the

equivalent of that rule, might apply, but that is not the case here. This mine being flooded, and incapable of examination, the defendant had the right to assume as a matter of fact that the statements of the plaintiffs in regard to the mine were correct, and it had the right further to assume that if it should proceed to work this mine in a proper manner, it would find that the property was a valuable mine, one which would pay for working.

From an examination of the charge of the learned Judge before whom this cause was tried, which is given in full, this Court can see the theory on which his Honor acted in charging the jury. It will appear that his opinion was that it was necessary for the defendant to show affirmatively that the plaintiff Charles Bamford misrepresented the condition of the mine. Upon this theory of the case as laid down by the Judge, no exception was taken, but the proposition of the counsel for the defendant (plaintiff in error here), that if it appeared that the consideration for the contract had failed, then the plaintiff could not recover, does not appear from the charge of the Judge; and this position, which it is here claimed is tenable, was overlooked or rather was disregarded. Now, if, in fact, the consideration for the lease had failed, so that there was no value coming to the defendant from acquiring the lease, then it is submitted that the charge of the learned Judge was erroneous, because it cannot successfully be contended that the plaintiff below could recover upon the contract the consideration for which had wholly failed.

The defendant's answer (last clause of folio 13 of the record) distinctly alleges that under said contract plaintiffs did not convey to the defendant any valuable or other consideration therein, and that said contract was and is wholly and entirely void, thus asserting in its answer the failure

of the consideration upon which the plaintiff in error here relies.

In view of all the facts in this case as appears from the record, it is submitted that the plaintiff in error has shown affirmatively that the rulings of the Court and the charge of the Court to the jury was prejudicial to it, and that a new trial should be ordered.

SIDNEY WARD,
Attorney and of Counsel for Plaintiff in Error.

150 U S 665

FILED.
OCT 19 1893
JAMES H. McKENNEY,
CLERK.

No. 8.

U. S. Supreme Court.

THE LEHIGH ZINC AND IRON COMPANY, LIMITED,
Appellant,

vs.

CHARLES BAMFORD AND EDWARD BAMFORD,
Appellees.

BRIEF FOR APPELLEES.

M. L. TOWNS,
L. A. FULLER,
Of Counsel for Appellees.

The Evening Post Job Printing House, New York.

United States Supreme Court.

THE LEHIGH ZINC AND IRON COMPANY, LIMITED,
Appellant,
vs.
CHARLES BAMFORD and EDWIN BAMFORD,
Appellees.

Brief for Appellees.

Statement.

Prior to May, 1883, the appellees were owners of mining property in Pennsylvania, upon which had been erected buildings and machinery for treating ores, at an expense of over $60,000 (fol. 3[illegible] that date executed to appellant a lease for (fols. 24 to 30) of the land, buildings and m with leave to alter, rebuild and enlarge and machinery (fol. 26), appellant agreei them and keep them in good repair (fol. 2[illegible]

Rent or "royalty" was to depend on th of ores treated (fol. 26).

Ores mined upon the property and treated in the works paid $1.50 per ton (page 13, top).

Ores mined upon other estates paid 50 cents a ton

"when removed from the premises" on two days of the week, and $1 a ton when removed on the other five days of the week (fol. 27). Working the ores from other estates was apparently the principal reliance of the lessees (fols. 42, 26, 27).

Payments were to be made the 20th January, April, July and October of each year (fol. 27).

And in case the "royalty," according to the above rates should in any year fall below the sum of $1,000, *then*, the lessee should pay such additional sum as would amount to $1,000, which sum should be the "royalty" for that year (fol. 28).

Lessees entered into possession and used the mine buildings and machinery and fixtures, and made no complaint of misrepresentation, failure, mistake or disappointment till their answer was filed in this cause two years and three months after taking the lease (fol. 33).

On the trial evidence was given (fol. 32) that one of the lessors before the lease was executed represented the mine to be valuable, but it was not testified that lessees believed his statements, or relied or acted upon them (fol. 32), and it was affirmatively shown that the lessees were acquainted with the character of the mine and relied upon their own knowledge and not upon any representations of lessors (fol. 33, 38, 42).

The Court charged the jury that if the property was of no value to defendants by reason of the condition of the mine, the verdict should be for the defendants (fol. 43), and that lessees could recover the loss, if any, sustained in working the mine on the strength of lessors' representations (fol. 44). That the rent should be reduced to the actual value (fol. 43).

Whereupon the jury gave plaintiffs a verdict for the whole amount claimed (fols. 31, 19).

Defendants' view of the law, as indicated by their requests to charge, apparently was that by inserting in a lease of a factory and machinery worth $60,000 a privilege to work an ancient mine, they could hold

and use the factory for nothing if the mine did not prove profitable.

And also that if the lessor made an erroneous representation about the mine, no matter how innocently, he could recover no rent for the factory and machinery.

The opinion filed upon the motion for a new trial, reported 33 Fed., 677, discusses most of the questions in the case. And shows that the jury must have found that no false representations were made. And that the use of the costly works and machinery was the consideration for the $1,000 a year, which was payable annually and not at the end of the ten years term.

POINTS.

I.

The motion to dismiss at folios 31–32 was properly denied for—

The rent was payable at the end of each year.

The amounts of royalty earned in the three calendar months preceding were expressly payable in January, April, July and October of each year.

And if in any year the total amounts were less than $1,000 *then* the party of the second part should pay a sum sufficient to make the "royalty for that year $1,000 which shall be the royalty for that year."

Instalments of rent have from time immemoria been held recoverable when earned, and no language is here found to take the case from general rule.

Were the language ambiguous it would be construed most strongly against the party promising to pay.

The New York Supreme Court agrees with the Court below in its interpretation of the language of the lease.

Smith *v.* Lehigh Zinc and Iron Co., 13 N. Y. Supplement, 450.

The sixth clause of the lease in effect said that if there was no ore on plaintiff's and "other estates" lessees would pay $1,000 a year for the machinery and works, with leave to lessors to forfeit lease if $1,000 not paid as a security against non-payment.

II.

It was not error for the Court to instruct the jury that the failure of lessees to make any complaint of false representations for some years and until sued for the rent was a proper subject for their consideration (fols. 33, 41).

The making of such representations was denied, and if lessees made no outcry it would seem that they were not abused.

Ferson *v.* Sanger, 1 Woodbury & Minot, 138.

III.

The first request (fol 44) was in effect that unless the plaintiff proved as a part of his case that the lessees had *actually mined* ores sufficient to pay $1,000 a year he could not recover, *i. e.*, that lessees could have $60,000 worth of our plant and pay nothing for it unless they mined say 2,000 tons.

And that defendants by neglecting to use the mine could avoid paying anything.

The lease prescribes that in such case lessees should pay $1,000 a year (fol. 28).

The lease not only does not state or imply that there is enough ore to pay $1,000 a year, but it does show that the possibility of its not containing so much was contemplated and *provided for* (fol.

28), viz., by securing to lessors the option to continue the lease of the buildings, &c., at $1,000 a year, *or* to require lessees to relinquish it. So the 7th subdivision of lease, page 14, respecting "prospect openings not finding ore" shows the ore was problematical. So defendants' letters (pp. 20, 21), show ore was doubted, and the buildings and machinery the principal objects of lease (see Opinion, 33 Fed., 677, 680).

The lease shows the use of the buildings and machinery was a part of the consideration. To decide the proportional weight given to each item would require that all the testimony be reported, which is not done.

Suppose the duties on zinc were reduced to so low a point as to stop mining, must plaintiffs rent?

IV.

The second request to charge (fol. 45) is that unless lessees could mine ore *without loss*, the plaintiffs could not recover, *i. e.*, if the market value of zinc should be such as to make mining unprofitable lessees could have the plant for nothing.

The considerations for the lessees' promise were various.

One was the exclusive privilege to enter upon lessor's land and search and dig for ore (fol. 25), with free ingress and egress, with the right to build roads and railroads.

Another was ten years' exclusive rig
costly works and machinery in concentr
from this and "other estates" (top of pag

The evidence is not all reported, but e
pears to show lessees did not expect to
penses from the ores of lessors alone (fols.

"We do not think the undertaking can be made successful if based on your estate alone." The third request is substantially the same as the second.

V.

The fourth and fifth requests (fol. 45) in effect ask a ruling that a misstatement as to the ores being sufficient to make the mine profitable, would entitle lessees to hold the plant *and product* without royalty and enable them to recover from lessors the expenses of working the mine. By the request the lessors were to have no allowance for such advantages as lessees derived.

That is to say, no matter how much product was brought from the mine if it fell below an amount to make the mine profitable, the lessors were bound to pay all the expenses, and the lessees be at liberty to *keep all the product*, which would be all clear gain for them, as they were to pay nothing for either the mine product or the use of the machinery.

We submit that when the Court instructed the jury to reduce the rent to its actual value (fols. 43, 44) and that if lessors made any misrepresentations, no matter how innocently, the lessees might recover such sums, if any, as they had expended in reliance upon such representations, the Court went as far as defendants could reasonably ask. But as the verdict shows no misstatements were made and no damages were sustained and the value to be as agreed, we are not able to see that the question has any present importance.

VI.

As the verdict shows that no damages were sustained by lessees in consequence of any erroneous statement of lessors; if it be that the alleged failure in ore did not entitle lessess to the gratuitous use of $60,000 worth of plant; and if the $1,000 annual rent is due at the end of each year, it would seem that the verdict was right and that the judgment should be affirmed.

L. A. FULLER and
M. L. TOWNS,
Of Counsel for Appellees.